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In the Supreme Court of the United States

OCTOBER TERM, 1956 57

UNITED STATES OF AMERICA, APPELLANT

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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Appellees have moved to dismiss or affirm on the ground that the United States, by requesting the district court to amend its earlier orders for the production of documents (entered over the Government's vigorous objection) so as to provide that noncompliance would result in dismissal of the action, thereby invited or consented to dismissal.[1] We submit,

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[1] In addition, appellee Colgate-Palmolive Company ("Colgate") has moved to affirm on the ground that the district court properly exercised its discretion in requiring disclosure of the grand jury transcript (Colgate motion, pp. 25-33). We shall not discuss that contention, since we believe that the importance of the substantive issues presented by this appeal is adequately set forth in our jurisdictional statement.

however, that the Government's proposal of this amendment shows neither invitation nor consent to dismissal.

1. The district court's original orders of July 24, 1956 directed disclosure of the transcript within 30 days, without specifying what the consequence of non-disclosure would be. If the Government had failed to comply with those orders, the district court, under Rule 37(b) of the Federal Rules of Civil Procedure, could have dismissed the action, issued a citation for contempt, stayed the proceedings until the Government complied, or barred the Government from using the transcript in preparing its case.

The Government's motion of August 15 requested the court (1) to amend the disclosure order to provide that, if production were not made, the court would dismiss the complaint, or, alternatively, (2) if amendment were denied, to stay the order pending the filing of an appeal therefrom or an application for an extraordinary writ (J.A. 24).[2] The Government explained to the court that it was proposing the amendment in order to avoid requiring the Attorney General to choose among several alternatives, each of which would "involve a serious violation of an important public interest" (J.A. 34-35; see J.A. 27-30). Thus, compliance with the production order would have entailed breach of grand jury secrecy

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[2] Lever Brothers Company ("Lever") now states (motion, p. 13) that, if the Government had sought review by way of extraordinary writ (as Lever claims it should have), "[t]here can be little doubt that it would have obtained a stay from either the trial judge or this Court." However, in the district court Lever "subscribe[d]" (J.A. 39) to a written statement filed by appellee The Procter & Gamble Company ("Procter") (in response to the Government's motion) which stated (J.A. 32) that Procter would have opposed the Government's alternative request for a stay.

and its maintenance, the Attorney General had concluded, was required in the public interest; noncompliance would have placed the Government's chief law enforcement officer in the unseemly position of disobeying an outstanding court order; and voluntary dismissal, in order to avoid either of these alternatives, would have meant sacrificing the broad public interest in obtaining a determination of the violation of the antitrust laws charged in the complaint and appropriate relief. The Government further pointed out (J.A. 31) that the alternative relief of staying the production order "would similarly avoid placing the Attorney General in the position of having to disobey an outstanding court order as a condition of testing its validity," and that neither alternative would prejudice the defendants (J.A. 30-31).

By proposing the amended order, the Government neither acquiesced in the court's prior ruling directing disclosure (to which it has consistently objected), nor consented to or invited dismissal of the complaint.[3] It merely suggested that the court clarify its original order to make explicit the particular sanction which would follow non-disclosure. The ultimate decision whether so to amend the order was of course for the court, and the court could have denied the motion even though all the parties favored it. Furthermore, appellees, far from opposing the Government's proposal to specify the consequences of non-disclosure, either on the ground that the sanction should not be determined

[3] Government counsel stated at the hearing on the motion that "in requesting this amendment of the order we are not in any way waiving any rights to challenge the substance of the ruling on appeal" (J.A. 36).

its own motion, the production ruling could have been tested on appeal from such dismissal. Cf. *Colton Valley* case, *supra*. These are applications of the general principle that where, as a result of non-compliance with an interlocutory order, a court enters a final judgment of dismissal, review of the latter necessarily embraces review of the earlier order upon which it depends. There is nothing to make the principle any less applicable here.

In the instant case, the judgments of dismissal are final orders, and therefore reviewable, because they "ended this suit so far as the District Court was concerned." *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794-795, note 1. They are no less final because their validity depends upon an earlier interlocutory order. Appellees' basic quarrel is with the fact that the district court accepted the Government's suggestion, in which they acquiesced, that dismissal, rather than some other sanction, be specified as the consequence of non-compliance.

In determining the appealability of the final judgments of dismissal, we submit that it is immaterial that the prior production orders were amended on the Government's motion to provide that, if production were not made, the court would dismiss the complaint rather than impose some other sanction. Here, as in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794-795, n. 1, "[t]he record fails to sustain appellees' contention that the Government invited the court to enter this order * * * dismissing the action." It is therefore respectfully submitted that the motions to dismiss or affirm should be denied, and that this Court should note

probable jurisdiction and decide the important public questions which the appeal presents.

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missal of the complaint which followed such non-compliance.

2. Whether appellees had shown "good cause" (under Rule 34 of the Federal Rules of Civil Procedure) for the production of the grand jury transcript.

STATEMENT

This is an appeal from orders of the district court dismissing a civil suit filed by the United States under Section 4 of the Sherman Act, charging violations of Sections 1 and 2 of that Act, in the soap and synthetic detergent industry. The ground of dismissal was the Government's refusal to permit appellees to inspect and copy a grand jury transcript in the Government's possession.

Between May, 1951 and November, 1952 a federal grand jury sitting in New Jersey investigated possible violations of the antitrust laws in the soap and synthetic detergent industry (R. 207). No indictment was returned, but on December 11, 1952, the United States filed a civil suit against the three major soap and synthetic detergent manufacturers—The Procter & Gamble Company ("Procter"), Colgate-Palmolive Company ("Colgate"), and Lever Brothers Company ("Lever")—and an industry trade association (R. 1–16). The complaint charged that since 1926 the defendants (appellees here) had conspired to restrain and monopolize interstate commerce in the production and sale of soap and synthetic detergents, in violation of Sections 1 and 2 of the Sherman Act; and that Procter, Lever and Colgate also had monopolized a part of that com-

merce, in violation of Section 2 of the Act (R. 9). The complaint set forth in considerable detail the means by which appellees had carried out the conspiracy and monopolization (R. 9–13).

During the course of extensive pretrial proceedings, the Government informed appellees in great detail of the facts upon which it was relying, and also disclosed to them a substantial portion of its evidence.[1] In connection with motions for inspection of the manufacturing appellees' documents, the Government submitted to appellees (at the court's suggestion, R. 227–229) Tentative Statements of Issues of Fact. These Statements set forth in considerable detail the purported facts upon which the Government was relying, but did not indicate the evidence which the Government would offer. At the hearing on the Government's motions, the court reviewed some of the Statements and stated that many of them provided appellees with sufficient information with respect to the Government's case to enable them to prepare their defense, and also showed the relevancy of the documents which the Government was seeking to inspect (R. 232–235). However, in view of appellees' contention that the statements of issues were too general, the court ruled that appellees could obtain further particularization by filing questions with respect thereto (R. 236).

[1] Thus, in July, 1953 the Government consented to an order permitting appellees to copy all documents in its possession which it had obtained from third persons (except where the latter objected to disclosure) (R. 70, 72).

Procter, Lever and Colgate then filed exhaustive written questions concerning the statements of issues (R. 236–238). The court sustained in part the Government's objections to some of the questions, and ruled that the Government "need not designate the documents relied upon or set forth the substance of its evidence of the alleged facts" (R. 238). In May, June and July, 1955, the Government filed detailed answers to questions propounded by appellees (R. 239–240).[2]

On September 24, 1954 (prior to the Government's submission of its Tentative Statements of Issues), Procter had filed a motion for discovery of the entire grand jury transcript (R. 118). The motion was not pressed, however, until more than a year later, when it was revived in response to the Government's effort to take the deposition of Siddall, a vice president of Procter. In September 1955, the Government called for Siddall's testimony to determine whether Procter had complied fully with previous production orders (Government's motion to compel answers, not printed, Tr. 1045; court's letter to counsel, not printed, Tr. 1141). Procter objected to the deposition unless the grand jury transcript was made available to it, pursuant to its motion of September 24 of the previous year[3] (Motion to postpone or limit deposition, not

[2] The tentative statements (Tr. 364–371, 607–610, 611–615, 790–794) and the answers to questions propounded by appellees (Tr. 616–628, 630–665, 667–683, 732–734, 736–742, 744–747, 986–994, 996–1004, 1006–1032) comprise 134 legal size pages of the unprinted record.

[3] Alternatively, Procter suggested that the testimony of Siddall and its other officials be made available (Motion to postpone or limit deposition, *supra;* brief in support thereof, not printed, Tr. 2017).